Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

MURPHY J. FOSTER, JR., in his official capacity as Governor of Louisiana, and W. FOX MCKEITHEN, in his official capacity as Secretary of State of Louisiana,

Petitioners,

v.

G. SCOTT LOVE, PAUL S. BERGERON, KATHLEEN B. BALHOFF, and BENNIE BAKER-BOURGEOIS,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITIONERS' REPLY BRIEF

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INTRODUCTION

Article I, Section 4, Clause 1 of the United States Constitution authorizes the states to prescribe the times, places and manner of holding elections for Congress unless Congress otherwise provides therefor. The parties in this matter agree that Congress, in enacting 2 U.S.C. §§ 1 and 7, sought to address the timing of congressional elections. The dispute here is whether Louisiana's change from a partisan primary to an open elections system changed the manner in which it conducts its elections (which all agree is not pre-empted by Congress) or the timing of its elections. An analysis of the laws in question indicates that Louisiana's change of election systems effected the manner, not the timing of its congressional elections.

I. Louisiana's enactment of its open elections system did not change the timing of its congressional elections.

Both the appellate court and the appellees concede that the elections system employed by Louisiana prior to 1978 satisfied the requirements of 2 U.S.C. §§ 1 and 7. *See*, J.A. 56, "Before 1978, Louisiana's election system for selection of representatives and senators complied with the federal election day statutes."; and *see also*, J.A. 78, "The plaintiffs concede that the traditional partisan state primary systems, such as Louisiana's pre-1978 system, do not actually conflict with or stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."; and *compare*, J.A. 78, n. 3 and

J.A. 68, n. 1. Under that election scheme, partisan primaries were held for the purpose of selecting candidates to appear on the general election ballot. The general election was held subsequent to the partisan primaries on the date established by 2 U.S.C. §§ 1 and 7.

The appellees also concede that Congress, in enacting 2 U.S.C. §§ 1 and 7 did not attempt to regulate the manner in which states conduct their elections, but only the timing of the elections. [*See*, Respondents' Brief on the Merits, hereinafter "BR.", at 22.]

When the state of Louisiana changed its elections system from the partisan primary scheme to the present open elections system, the one change it did *not* make was to alter the *timing* of its general elections for Congress. Under the old scheme, the general elections were held on the first Tuesday following the first Monday in November, as required by 2 U.S.C. §§ 1 and 7. Under Louisiana's current law, the general election for Congress are held on that same day.

The purpose and effect of the enactment of Louisiana's current law was to change the *manner* in which candidates qualify for the general election, from a closed partisan primary to an open primary scheme in which all candidates, regardless of party affiliation, are placed on the ballot.

The appellees seek to refute that fact by arguing in their brief that Louisiana's primary elections are not "primaries" because in some instances one candidate emerges from the primary as the lone qualified candidate for the general election, and in such instance no contested general election occurs. They assert that Louisiana's open

elections system is invalid because "pre-election day 'primaries' cannot prematurely end the contest for Congress by themselves." [BR. at 21.]

This argument is contradicted by the appellees own assertions in the lower courts that Louisiana's prior elections system satisfied the requirements of 2 U.S.C. §§ 1 and 7. *See*, J.A. 78, n. 2 and n. 3. Under this prior system, the primary elections held prior to "federal election day" more often than not conclusively determined the candidate elected to Congress, so that often no contested congressional elections took place on the first Tuesday following the first Monday in November. *See*, J.A. 68, "Like its successor, the Louisiana party primary system that preceded the current open primary and general election system, more often than not failed to produce contested elections on the federal election day."; and *see also*, J.A. 68, n. 1.

The appellees, at footnote 6 of their brief, [BR. at 6] further contend that only Louisiana permits "conclusive" elections in advance of the 2 U.S.C. §§ 1 and 7 date. The contention substitutes fiction for reality. In any other state, if a candidate qualifies for a general election by a primary election and is ultimately unopposed in the general election, the primary election is, in effect, a "conclusive" election that determines the candidate elected to Congress. Other states may, or may not, place the name of unopposed candidates on the general election ballot, but whether the unopposed candidate is placed on the ballot or not does not change the fact that the primary election was the only contested election for the office he or she sought, and that it occurred before the 2 U.S.C. §§ 1 and 7 date. *See*, J.A. 68, n. 1.

The same "conclusiveness" can occur prior to the 2 U.S.C. §§ 1 and 7 date when only one candidate files the necessary qualifying papers for a particular seat. Under Louisiana law, that candidate is deemed elected upon the close of qualifying, well before the first Tuesday in November. Yet neither the appellees nor the appellate court found that provision of Louisiana's law objectionable. *See*, J.A. 78, n. 3, and BR. at 7, n. 7.

The appellees seek to attach some significance to the fact that Louisiana's "primary" election does not completely fit into the description of the term "primary" as stated by this court in *Newberry v. U.S.*, 256 U.S. 232 (1921). While it is admitted that Louisiana's primaries are not "methods by which *party adherents* agree upon candidates . . . for choice by all qualified electors" *Id.* at 250, (emphasis added), Louisiana's system is a method by which all of the electorate "winnow down the number of candidates to be placed on the ballot at the general election." [BR. at 19]. In some instances only one candidate survives the primary to qualify for the general election which is a direct result of the *manner* in which Louisiana determines the candidates eligible for the general election.

The appellees' attempt to "define" primaries in a partisan context reveals the fallacy of the appellees' argument and the appellate court's rationale. Both attach a special significance to partisan primaries, such that partisan primary elections systems resulting in uncontested congressional elections on the first Tuesday following the first Monday in November somehow satisfy the requirements of 2 U.S.C. §§ 1 and 7, while a non-partisan primary elections system that yields the same result, does

not. This gives clear indication that the real focus of the appellees and the appellate court is the *manner* of the election, not the timing.

Neither the statutory nor the legislative history of 2 U.S.C. §§ 1 and 7, suggest that Congress intended to preempt the states' ability to determine the manner in which candidate qualifying is conducted. Thus the states are free to establish the manner in which candidates qualify for the congressional elections to be held on the first Tuesday following the first Monday in November. There is also no indication that Congress intended to mandate that contested elections must always take place on the date established by 2 U.S.C. §§ 1 and 7, even if only one candidate has qualified for the election to be held on that date. Rather, 2 U.S.C. §§ 1 and 7 merely require that if more than one candidate has qualified for the general congressional election, that election must be held on that date.

Louisiana's law comports with that requirement. All congressional elections in which more than one candidate has qualified pursuant to Louisiana law are held on the first Tuesday following the first Monday in November.

II. The Federal and State laws at issue here should not be unreasonably interpreted so as to create a conflict between them.

The sparse legislative history of what is now 2 U.S.C. §§ 1 and 7 indicates that the intent of the legislation was to limit the number of trips voters must make to the polls, ("the poor laboring man who goes to the polls to vote looses his day's work") and to limit states and political

parties from obtaining undue advantage by conducting their elections at varying times. Cong. Globe 42d Congress, 2d Session 141 (1871). There is absolutely no indication that Congress intended to limit the States' ability to decide the manner in which candidates are to qualify for the general election held on the date established by 2 U.S.C. §§ 1 and 7, or that Congress intended that general elections for Congress must always be contested.

As discussed in appellants' original brief, Louisiana's open elections system comports with the intent of the federal statutes better than most states, by limiting the maximum number of trips to the polls to two, and by holding the primary election closer to the general election date than do other states. There is no need to give the federal statutes the unreasonable interpretation placed upon it by the appellate court and appellees, so as to create a conflict, when Louisiana's law comports fully with a reasonable interpretation of the laws at issue.

The appellees, throughout the district court and appellate court proceedings, asserted that the courts should throw out Louisiana's current system and reinstitute the previous partisan primary system. *See*, J.A. 59, "Respondents contend that this court should declare the 1978 Louisiana election code invalid and reinstate the pre-1978 election law." In their brief to this court, the appellees for the first time adopt the appellate court's suggested remedy. That Louisiana need only move the dates of its primary and general elections so that the primary election be held on the 2 U.S.C. §§ 1 and 7 date, and the general election held subsequent to that date. *See*, J.A. 74.

Neither "remedy" suggested by appellees satisfies the goals of the federal legislation to any greater extent than does the present law. In fact, reversion to the partisan primary system will require *more* trips to the polls, and primary elections held earlier in the year than the present open primary. Nor will moving the date of the elections to later in the year decrease the number of trips the voters will make to the polls, or alleviate any known or perceived advantage or disadvantage to any political parties or the state. In fact, neither the appellees nor the appellate court has articulated or even implied that any of the "evils" discussed in the legislative history have occurred as a result of Louisiana's current open elections system.

The Supremacy Clause, Article V, Clause 2 of the United States Constitution, operates to invalidate or otherwise render unenforceable state laws that conflict with federal laws on the same subject. Here, however, a conflict exists between the federal and state law only if the federal law is given an unreasonable and unnecessary interpretation. The appellate court improperly interpreted 2 U.S.C. §§ 1 and 7 and therefore erred in finding that 2 U.S.C. §§ 1 and 7, was in conflict with Louisiana's open elections system when utilized for Congressional elections.

CONCLUSION

The Louisiana open elections system, establishing the manner in which Louisiana elects its members to Congress, does not conflict with the provisions of 2 U.S.C.

§§ 1 and 7 establishing the timing of the Congressional elections. The decision of the United States Court of Appeals for the Fifth Circuit invalidating Louisiana's open elections system should be reversed.

Respectfully submitted,

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